IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 611

LOEW'S INC., PARAMOUNT PICTURES, INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, STANLEY COMPANY OF AMERICA, INC., UNIVERSAL FILM EXCHANGES, INC. and UNITED ARTISTS CORPORATION.
Petitioners,

v.

WILLIAM GOLDMAN THEATRES, INC.,
Respondent.

REPLY BRIEF OF WARNER DEFENDANTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Plaintiff is in error when it states that Warner did "expressly repudiate" any issue other than the speculative nature of the damage assessed (Pltff's Br., p. 14).

Four of the six "Questions Presented" involved questions of law relating to the issue of liability (Warner Br., pp. 7-11).

There are two basic questions here:

1.) Whether it is illegal for separate business concerns to license their best pictures first run to another concern which has the theatres capable of yielding to them the greatest revenue; and

2.) If this be illegal, whether a court may speculate how much revenue (less than those theatres) another inferior theatre might have yielded if it had had equal opportunity to bid for these same pictures.

Since both questions involve the capacity for revenue of the theatres, to that extent the issues of liability and damage are necessarily interwoven.

That the Erlanger's capacity for revenue was inferior to that of the Warner theatres, and that the Court necessarily speculated as to how much less it was, is clear from plaintiff's brief stating (pp. 10-11):

> "The plaintiff requested the court to fix the amount of damage on the basis of the actual receipts of the [Warner] theatres, with appropriate deductions for costs of operation, treating the Erlanger Theatre as equal to the [Warner] theatres.
>
> On the basis of absolute equality of theatres, the amount of plaintiff's damage would have come to over $300,000.
>
> The trial Judge entered a verdict * * * in the amount of $125,000 on the theory that if the Erlanger Theatre had been in operation its receipts *probably would not have equaled the average receipts of the* [Warner] theatres, * * *."

The average receipts of the Warner theatres were thus discounted because the Erlanger "probably would not have equaled the average receipts of the [Warner] theatres".

Note the absurdity:

> First, a postulate of average equality.
> Next, a finding of inequality—$175,000 profits less than the postulated $300,000 average.
> Q.E.D. the Erlanger could not have been equal to the average!

The only basis for taking the average of Warner theatres was alleged comparability. But the alleged comparability is disproved by the finding of gross disparity.

We are amazed at plaintiff's attempt to compare its 1859 seat Erlanger Theatre with the 4387 seat Warner Mastbaum Theatre, and the statement in its brief that "it cannot be successfully denied that both with respect to location and reputation for successful operation, the Erlanger Theatre was, and is, as good as the Mastbaum, * * *" (Pltff's Br., p. 15). The record is completely to the contrary, for the court specifically found that the location of the Mastbaum as well as the other Warner theatres "is superior to that of the Erlanger" (Finding No. 20, R. 947a), and plaintiff's president, William Goldman, unequivocally described the Mastbaum Theatre as

> "the biggest thing in the country; nothing compares with it, and that goes for the Roxy" (R. 418a).

Contrast the *Bigelow* case (327 U. S. 251).

In the *Bigelow* case, there was a finding by the jury that plaintiff's theatre was superior to defendant's, and specific testimony that plaintiff's superior theatre would gross at least as much as defendant's inferior theatre had actually grossed.

There was therefore no element of speculation whatsoever there.

Here there was a finding that plaintiff's theatre was inferior and no testimony was offered by plaintiff as to

what its inferior theatre could gross. Here, therefore, there was nothing but speculation, and a holding of liability based on a comparability in fact found to be non-existent.

We repeat that this case involves millions of dollars, notwithstanding plaintiff's characterization that this is "an obvious exaggeration" (Pltff's Br., p. 14, Footnote 8). While it is true that the judgment in the case at bar is for $435,000, yet, that covers only a damage period of 66 weeks ending December 8, 1942, and plaintiff has pending a second action for the ensuing four year period, in which the recovery sought is $8,400,000! The trial of this second suit was fixed for March 15th, 1948, but [redacted] has been adjourned.

It is appropriate that the decision below be reviewed.

Respectfully submitted,

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